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IN THE

Supreme Court of the United States

October Term, 1967.

No. 908.

DAUPHIN DEPOSIT TRUST COMPANY and CLEMENT FILIPPELLI, as Treasurer of Dauphin Deposit Trust Company,
Petitioners,

v.

UNITED STATES OF AMERICA and VICTOR A. FRANCHI, Special Agent, Internal Revenue Service,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

REPLY BRIEF.

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Supreme Court of the United States

OCTOBER TERM, 1967.

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DAUPHIN DEPOSIT TRUST COMPANY AND CLEMENT FILIPPELLI, AS TREASURER OF DAUPHIN DEPOSIT TRUST COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA AND VICTOR A. FRANCHI, SPECIAL AGENT, INTERNAL REVENUE SERVICE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY BRIEF.

Petitioners submit this Reply Brief to correct certain statements made in Respondents' Memorandum in Opposition to the Petition for Certiorari in the above-captioned matter.

The Writ should be granted and there is basis for review.

1. Petitioner has not ignored the Record in contending that the decision below conflicts with *United States v.*

Powell, 379 U. S. 48 (1964). As stated in *Powell* the Internal Revenue Service "must show that the investigation will be conducted pursuant to a legitimate purpose". In order to establish that the purpose is legitimate, the Internal Revenue Service must show that its investigation falls within the statute of limitations. Respondents' Memorandum states that the statute of limitations had been extended by written agreements. While the affidavit relied upon did state that extension agreements were executed on February 24, 1965, and November 1, 1965, neither the affidavit nor any other evidence in the case indicated to what years the respective agreements applied. The extension agreements may be totally ineffective. For example, if an extension agreement alleged as having been executed on November 1, 1965 applied to the calendar year, 1961, it would be void and, as to that extension agreement, 1961 would remain a "closed year". (R. 8a; Int. Rev. Code of 1954, § 6501(a), 26 U. S. C. A. § 6501(a).) Note that even the alleged agreements expired December 31, 1966. Respondents failed to bring themselves within the statutory exceptions to the statute of limitations. Merely raising the possibility of falling within an exception is not enough!

> "The rights of an internal revenue agent to require production of papers and records for examination are statutory, and in order to obtain the relief granted by statute, he must bring himself within the terms thereof." *First National Bank of Mobile v. United States*, 160 F. 2d 532 (5th Cir. 1947).

Respondents did not, as required by *Powell*, show the relevancy of the inquiry. While they did, upon examination by the Court, identify the persons being investigated, there was never any showing or discussion of relevancy either in the papers filed by the Internal Revenue Service or in any testimony given.

Respondents' Memorandum would have the Court believe that the Internal Revenue Service had only seen original copies of bank statements and some cancelled checks. The Record is contrary. The Special Agent testified that he had been shown "records" by the taxpayer (R 32a). The Special Agent testified:

> ". . . we issued a summons for the remainder of the records directed to Mr. Weiner (one of the taxpayers) as President of the Corporation (another taxpayer) and there were records provided. . . ." (R 32a)

The Special Agent also testified:

> (Question by Petitioners' Counsel): "So you're asking for a duplicate or confirmation set of information that you had already gotten?
>
> * * *
>
> THE WITNESS: A. Yes, but I feel that the bank records are the third party records that should be used." (R 35a)

Contrary to the statement of Respondents' Memorandum (pg. 3), there is absolutely nothing in the Record to even suggest that the Internal Revenue Service does not now have the taxpayers' records or that the Internal Revenue Service has never seen most of the material sought. Why does the Service now ask the innocent Petitioners for copies of original documents it already has? The answer is not in the Record!

2. For the most part, the matters discussed in paragraph 2 of Respondents' Memorandum have been treated in the Petition. Several items, however, should be noted.

When the District Court, several months subsequent to issuing its enforcement order, issued a memorandum in

support thereof, the Judge did use the phrase "the most expensive approach" in describing Petitioners' cost estimate of producing material demanded in the Internal Revenue Service summonses. The Record refutes that conclusion. The Record shows that the lowest cost labor was used, that many equipment costs were not included and that the net cost estimate was low (R 56a et seq.).

Respondents' Memorandum states:

> "*United States v. Third Northwestern National Bank*, 102 F. Supp. 879 (D. Minn.) and *United States v. First National Bank of Fort Smith, Arkansas*, 173 F. Supp. 716 (W. D. Ark.), on which petitioners rely (Pet. 7-8), involved significantly different summonses. . . ." (R. Mem. 4)

The significant difference in those summonses was that they sought substantially less material than that being sought by the Internal Revenue Service in the instant case. The applicable parts of the respective summonses were quoted in the Court opinions as follows:

Third Northwestern National Bank

> "All records of cashier's checks, bank money orders and certificates of deposit purchased by, endorsed by or paid to or for (taxpayers) together with any and all such paid, cashed or honored cashier's checks, bank money orders and certificates of deposit and supporting documents and records now in your possession or custody . . ."

First National Bank of Fort Smith

> "Signatu[illegible]ards, ledger sheets, deposit tickets, microfilm records of checks, on all individual and corporate accounts including checking, savings, special, trust or otherwise. . . ."

Throughout this case Respondents repeatedly have accused Petitioners of refusing to cooperate with the Service. The truth is that Petitioners have cooperated for years with the Service in these matters and did so until the cooperation burden became too great. This was repeatedly brought out in the Record. (See, inter alia: R 28a and 122a.)

Finally, Respondents continually tug at their own boot straps by raising the possibility that the taxpayers under investigation may not have any accounts with Petitioners. In view of the Special Agent's testimony under oath that he saw original documents and records evidencing the various accounts which Respondents intimate might not exist, that possibility is utterly hollow and the position less than candid.

Unquestionably, a Writ of Certiorari should be granted in this matter.

Respectfully submitted,

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